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REC.
STATE OF NEBRASKA
OFFICIAL
OCT 11 1991
DEPT. OF JUSTICE

DATE: October 11, 1991

SUBJECT: McCulley Township Ordinance

REQUESTED BY: E. Benjamin Nelson, Governor

WRITTEN BY: Don Stenberg, Attorney General

In a letter to the Attorney General dated October 8, 1991, you state as follows:

> I am in receipt of your opinion dated October 4, 1991, stating that the Ordinance passed by the McCulley Township on August 21, 1991, is not inconsistent with the Compact, state statutes or the Low-Level Radioactive Waste Disposal Act. The McCulley Township Board has requested that I "instruct all state agencies charged with licensing a radioactive waste dump in Nebraska, US Ecology, and the Central Interstate Low-Level Radioactive Waste Compact Commission to immediately discontinue plans to illegally dispose of radioactive and hazardous waste within McCulley Township."
>
> Based on your opinion, does the McCulley Township Ordinance have any impact on the activities being conducted by the Nebraska Department of Environmental Control and U.S. Ecology? Is the State in violation of the Ordinance by continuing the license review process? If so, what steps must be taken by the State to comply with the Ordinance, state Statutes, the Compact and the Act?

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Your first question concerning whether the McCulley Township Ordinance has "any impact on the activities being conducted by the Nebraska Department of Environmental Control or US Ecology" is not sufficiently clear for us to be able to attempt to answer. If you could identify what activities specifically you have questions about, we will attempt to respond.

Your second question is whether the State is in violation of the Ordinance by continuing the license review process. No, the State is not in violation of the Ordinance. Our opinion was that the Ordinance was not inconsistent with State law, not that the Ordinance supersedes State law. Neb.Rev.Stat. Section 81-15,110 (Reissue 1987) specifically provides that it "shall be unlawful for any person to dispose of low-level radioactive waste unless licensed by the Department pursuant to the Low-Level Radioactive Waste Disposal Act."

The Department of Environmental Control is specifically authorized to license low-level radioactive waste disposal facilities. See generally the Low-Level Radioactive Waste Disposal Act Section 81-1578 et seq.

The statute under which the Township acted, Neb.Rev.Stat. Section 23-224(6) (Reissue 1987) authorizes a township to adopt an ordinance "to prevent the exposure or deposit of offensive or injurious substances within the limits of the town." That statute only authorizes the township to adopt an ordinance to prevent the deposit of substances within the township, not to prevent the State from issuing a license.

Therefore, so far as State law is concerned, the Department of Environmental Control may continue to process US Ecology's application, and if the application is determined to meet all State and federal requirements for the issuance of a license, the Department may issue the license.

We would note in passing that the issue addressed in our opinion to you of October 4, 1991 (Opinion #91073) is a close question. We would further note that whatever the Attorney General's opinion is regarding the validity of the Ordinance, it seems almost inevitable that the issue will be litigated unless the Legislature clarifies the issue in one direction or the other.

If a license is granted for the Boyd County facility, the Township could well file suit to block delivery of radioactive substances into the Township. The decision which faces US Ecology, and which existed even prior to the issuance of the October 4, 1991 Attorney General's Opinion, is whether US Ecology wishes to seek a

court determination of the issue prior to licensing or construction.

In summary, it is our opinion that the Department of Environmental Control has the legal authority to license the proposed Boyd County facility if it meets all federal and State requirements. However, the McCulley Township Ordinance provides that "offensive or injurious substances", which presumably include radioactive waste materials, may not be deposited at the site. As previously stated, it appears likely that the validity of the McCulley Township Ordinance will ultimately be determined in court. It is, of course, possible for the Legislature, should it so choose, to amend the law to provide for a different result.

Sincerely,

Don Stenberg
Attorney General